NO. 83-2064

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1983

T.H. BELL, SECRETARY OF EDUCATION,

Petitioner,

v.

STATE OF NEW JERSEY,
DEPARTMENT OF EDUCATION,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Third Circuit

BRIEF IN OPPOSITION

IRWIN I. KIMMELMAN
Attorney General of New Jersey
Attorney for Respondent, State of New Jersey, Department of Education
Richard J. Hughes Justice Complex
CN 112
Trenton, New Jersey 08625
(609) 292-8577

MICHAEL R. COLE
First Assistant Attorney General
Of Counsel

MARY ANN BURGESS
Assistant Attorney General

JAYNEE LaVECCHIA
REGINA A. MURRAY
Deputy Attorneys General
On the Brief

Adams Press Corp., 60 Park Place, Newark, New Jersey 07102—(201) 623-9611

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Counter-Statement of the Question Presented

Whether the 25% eligibility standard, enacted as part of the 1978 Amendments to the Elementary and Secondary Education Act of 1965 to correct the aberrant Title I regulation which denied disadvantaged children the benefits of Title I programs simply because their attendance areas were within school districts with extremely high levels of poverty, should be applied to the Newark audit wherein the federal auditors, applying the discredited Title I regulation, had declared ten attendance areas ineligible for receipt of Title I moneys even though those areas had concentrations of poverty ranging from 27.9% to 33.5%.

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BRIEF IN OPPOSITION

The Respondent, State of New Jersey, Department of Education, respectfully requests that this Court deny the Petition for Writ of Certiorari seeking to review the opinion of the United States Court of Appeals for the Third Circuit reported at 724 F.2d 34.

Counter-Statement of the Case

This case involves the federal audit of the Newark Title I program for the period from September 1, 1970 through August 31, 1973. The audit had, as its primary focus, the Title I program implemented in Newark during the 1971-72 fiscal year. The federal auditors found that the Newark school district had correctly calculated its district-wide low-income percentage and, therefore, had received the correct amount of Title I moneys *in toto* for that year (PNJa12).[1] Furthermore, the auditors did not question the eligibility of the poor and disadvantaged children who had benefited from the Title I programs nor did they challenge the adequacy of the supplemental education programs offered by the district to these eligible children. Finally, there was not even a suggestion in the audit that the federal Title I moneys had been used to supplant rather than supplement the State and local educational effort. Rather, the auditors' sole concern was whether the Newark school district, for the 1971-72 fiscal year, had properly allocated its Title I moneys among its various attendance areas. It is this narrow eligibility issue which was decided by the Third Circuit, in its opinion below, and which the Secretary requests this Court to review.

Title I of the Elementary and Secondary Education Act of 1965 was intended to provide financial assistance in "areas with concentrations of children from low-income families to expand and improve their educational programs by various means which contribute particularly to meeting the special educational needs of educationally

[1] PNJa— refers to the Appendix submitted on behalf of the State of New Jersey, Department of Education, in the Court of Appeals for the Third Circuit.

deprived children." 20 U.S.C. §241a. The statutory eligibility standard, at the time of the Newark audit, provided that Title I funds should be used for projects designed to meet the particular educational needs of disadvantaged children living in "school attendance areas having *high concentrations* of children from low-income families." (emphasis added) 20 U.S.C. §241e(a)(1). This broad eligibility standard was interpreted by §116.17(d)(2) of the Title I regulations as including attendance areas in which the percentage of children from low-income families was equal to, or greater than, the percentage of such children in the entire school district. 45 C.F.R. §116.17(d) (1972). Therefore, pursuant to this Title I regulation, if the district-wide percentage of children from low-income families was 10%, any attendance area where the incidence of poverty was at, or in excess of, 10% would be eligible for receipt of Title I funds.[2]

The Newark Title I application for the 1971-72 fiscal year showed that *33.9%* of the children in the Newark school district were from low-income families (PNJa290). The narrative portion of the 1971-72 application also demonstrated that Newark was uniformly disadvantaged in other ways. Statistics showed a jobless rate in 1970 of 14%, a rate double that needed to qualify under the Economic Development Act at that time. Another 35,000 residents were earning $3,000 per year or less. In 1971, the Model Cities program in Newark was expanded to include the entire city. At the time the 1971-1972 proposal was submitted, Newark had a black population of 54.2% with another 11% of its population of Hispanic

[2] The Title I regulations also permitted an entire school district to be designated as eligible if there was no wide variance in the number or percentage of children from low-income families within the district. 45 *C.F.R.* §116.17(d).

background. The City also had the highest percentage of slum housing in the nation, the highest incidence of crime, and the second highest birthrate. Of particular significance to the Title I program, and exacerbating the inherent difficulties of obtaining precise statistics of Newark's low-income population, was the fact that in 1970-71, Newark had the highest population turnover in the nation. Indeed, Model Cities data indicated that mobility rates reached as high as 80% for schools in the Newark Title I area (PNJa298).

An acceptable data source for determining Title I eligibility were AFDC statistics. *ESEA Title I Program Guide # 44* (March 18, 1968) (PNJa223). However, at the time the 1971-72 application was prepared, the Newark Board of Education did not have available to it complete AFDC statistics. It, therefore, had to employ an alternate method to determine eligibility utilizing the statistical data then available. It was a methodology which was recognized by the federal auditors as a reasonable alternative for measuring eligibility of school attendance areas under Newark's unique circumstances (PNJa13). *Cf. ESEA Title I Program Guide #44* (PNJa223).

Analyzing Newark's application of this alternative method, the federal auditors found that Newark had correctly used it to calculate its district-wide low-income percentage. However, in determining the Title I eligibility of its attendance areas, Newark had compared (1) the number of AFDC children residing in each attendance area and actually attending public schools with (2) the total number of children residing within each area and attending the public elementary schools. The auditors found this formula unacceptable since there was not a direct relationship between the component elements. They replaced the Newark formula with one which eliminated the AFDC children enrolled in secondary schools from the comparison. By applying their revised formula, the auditors found thirteen (13) schools ineligible for Title I funds in the 1971-72 fiscal years. These schools had, according to the federal recalculations, low-income percentages ranging from 13% to 33.5% (PNJa15, PNJa 17, PNJa18).[3] The auditors found, however, that the practices employed by Newark to determine Title I eligibility were corrected by 1972-73, the third and final year covered by the audit. Indeed, the auditors concluded that:

> . . . the low-income percentages computed for school year 1972-73 were proper and were based on more precise information. The Essex County Welfare Board had furnished BOE [Newark] with a list showing the name and address of each child, ages 5-17, in the ADC category. BOE [Newark] converted this data into attendance area statistics. *Thus, BOE [Newark] had available for the first time statistics indicating the total number of children from low-income families residing in the school attendance area, inclusive of drop-outs and attendees at public, non-public and special education schools.* (Emphasis added) (PNJa19).

There were, therefore, no audit exceptions for 1972-73, the final year of the Newark audit (PNJa6). On the basis of their report, the auditors concluded that New

[3] In addition to this error which occurred only in 1971-72, the federal auditors determined that $132,287 in Title I funds had been used during 1970-71 in schools which they concluded did not meet the eligibility requirements of the Title I regulations.

Jersey should return $1,161,917 to the Office of Education.

On October 21, 1976, the State of New Jersey requested a review of the final audit determination of the Newark Title I program, thereby commencing an administrative proceeding which was to continue until 1980. New Jersey argued throughout this proceeding that the attendance areas declared ineligible by the federal auditors were, in fact, eligible for Title I assistance.[4] In support of this position, the State submitted recalculations of Title I eligibility. In these recalculations, the State measured eligibility by comparing the total number of AFDC children from each attendance area enrolled in public elementary and secondary schools with the total number of children enrolled in public elementary and secondary schools (PNJa245 to PNJa247). According to the State's recalculations, all but two of Newark's attendance areas had low-income percentages in excess of the district-wide average of 33.9% and would, therefore, be eligible for receipt of Title I funds. The formula employed by New Jersey responded to the federal auditors' criticism of the Newark methodology since the component elements were directly related. More importantly, unlike the federal recalculations, it did not remove AFDC children in secondary schools from the formula; rather, it simply added all children in public secondary schools

[4] It is incorrectly asserted by *amicus*, Lawyers' Committee for Civil Rights under Law, that New Jersey "admits that the funds were expended at ineligible schools." *Amicus* brief at 4. Nothing could be wider of the mark. Although New Jersey acknowledged before the Education Appeal Board that Newark had applied a "flawed" formula to determine eligibility of school attendance areas, New Jersey has consistently maintained throughout this protracted litigation that those attendance areas were indeed eligible to receive Title I funds. Pet. App. 35a to 36a, 49a to 56a; PNJa55, PNJa69 PNJa74 to PNJa77.

to the comparison. The State's recalculations, therefore, more accurately reflected the number of low-income children attending public schools in the various attendance areas than did those of the federal auditors.

In the alternative, New Jersey argued that the whole of the Newark school district, which had a district-wide low-income percentage of 33.9%, qualified for designation as a Title I area under regulations applicable in 1971 and in accordance with the clearly expressed intent of Congress (PNJa64 to PNJa65).

In addition to these substantive challenges to the validity of the final audit determination, New Jersey argued that the United States Department of Education was without statutory authorization to order the State to repay moneys received under Title I grants in the 1970-71 and 1971-72 school years.

The Education Appeal Board rejected both the jurisdictional and substantive arguments advanced by New Jersey and demanded that the State repay $1,031,394 to the United States Office of Education.[5] By letter dated May 7, 1980, New Jersey was advised that the Panel's Decision was the final decision of the United States Department of Education.

A Petition for Review of the decision of the Secretary of Education was filed with the United States Court of Appeals for the Third Circuit pursuant to 20 U.S.C. §2851. In it, New Jersey once again advanced both its substantive and jurisdictional arguments. In an opinion issued on October 13, 1981, the Third Circuit granted

[5] The only difference between this sum and the repayment demanded in 1976 was $130,613, an amount barred by operation of the applicable statute of limitations. 20 U.S.C. §884 (1976) (PNJa 403).

the Petition of Review, reversed the order of the Department of Education and remanded with instructions "to vacate the orders requiring a repayment by petitioners of previously received Title I funds." *State of New Jersey, Dept. of Education* v. *Hufstedler,* 662 F.2d 208, 219 (3rd Cir. 1981). Since the Third Circuit concluded that the Department of Education was without authority to issue the Order before it, the substantive challenges advanced by New Jersey to the correctness of the audit determination were not reached.

This Court granted *certiorari* and reversed, concluding that the pre-1978 version of the Elementary and Secondary Education Act contemplated that states misusing federal funds would incur a debt to the Federal Government for the amount misused. *Bell* v. *New Jersey,* —— U.S. ——, 103 S.Ct. 2187, 76 L.Ed.2d 312 (1983). The Court also found that the Secretary had followed the proper procedures in administratively determining the amount owed by the states to the Federal Government. However,

> [w]hether that determination is supported by substantial evidence and by application of the proper legal standards is a question for the courts, if the affected parties seek judicial review. Here, New Jersey and Pennsylvania sought that review, and we remand to the Court of Appeals to permit it to undertake to review the challenges raised by each State to the Secretary's determination.[6] *Bell* v. *New Jersey, supra,* 103 S.Ct. at 2198, 76 L.Ed.2d at 328.

[6] Upon remand, the Third Circuit designated one of its judges to hold conferences with the respective parties in order to determine whether the matters could be settled. Although the Pennsylvania case settled, efforts to resolve the New Jersey matter failed. An Order was thereafter issued on September 27, 1983 directing the parties in the New Jersey case to file supplemental briefs.

Furthermore, the Supreme Court having only decided that states can be held liable for the misuse of funds, left

> . . . for the Court of Appeals on remand the question of whether the substantive standards of the ECIA or the 1978 amendments can apply to grants approved and paid under the pre-1978 ESEA. *Bell* v. *New Jersey, supra,* 103 S.Ct. at 2192, 76 L.Ed. 2d at 321.

In his concurring opinion, Justice White further noted

> . . . these cases do not involve any question as to the substantive standard by which a claim that a recipient has violated its Title I commitments is to be judged. Rather, they concern the abstract question whether the Secretary has the right to recover Title I funds under any circumstances. In my view, *there is a significant issue whether a State can be required to repay if it has committed no more than a technical violation of the agreement* or if the claim of violation rests on a new regulation or construction of the statute issued after the State entered the program and had its plan approved. *Bell* v. *New Jersey, supra,* 103 S.Ct. at 2199, 76 L.Ed.2d at 329 (emphasis added).

Upon remand, the Third Circuit decided the issue left to it by this Court, *i.e.* whether the substantive standards of the 1978 Amendments apply to the Newark Title I program. It did so, however, in a particularly restrictive fashion. The court found initially that the eligibility standards contained in the Title I regulation, 45 C.F.R. §116.17(d) (1972), worked an "injustice . . . on areas with high concentrations of low income families." *State of New Jersey, Dept. of Education* v. *Hufstedler,* 724 F.2d 34, 36 (3rd Cir. 1983). It found that Congress had enacted, as part of the 1978 Amendments to the ESEA,

a 25% eligibility standard to remedy these inequities. 20 U.S.C. 2732 (a)(1). This standard allows local educational agencies to declare school attendance areas eligible for Title I funds if at least 25% of the children in that area are from low-income families and if certain conditions are met. The court found that the 25% standard was included in the 1978 Amendments "to correct regulations that frustrated the basic objectives of the Title I program." *Id.* at 36-37. Since the Secretary's application of the overruled Title I regulation to Newark continued precisely the same injustices as Congress sought to correct by enacting the 25% standard, the Third Circuit concluded that the eligibility of Newark's school attendance areas should be measured by that corrective standard.[7] The court below observed, however:

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[7] The calculations of the federal auditors show that the following Newark attendance areas had an incidence of poverty during the 1971-72 fiscal year in excess of 25%:

School Attendance Areas	Low-Income Percentages as Recomputed by Federal Auditors	Title I Expenditures Disallowed by Federal Auditors
South 17th Street	33.5%	$104,842
Franklin	32.4	115,227
Clinton Jr. High	32.1	58,214
Waverly Avenue	31.9	56,665
Newton Street	31.5	69,463
Hawkins	30.3	102,803
Burnet Street	30.2	56,007
Central Avenue	29.4	61,532
Madison	28.8	103,750
Weequahic High	27.9	53,284

(PNJa15, PNJa17, PNJa18).

(Footnote continued on following page)

Our decision today, unfortunately, will not bring this protracted controversy to an end. While the record does indicate that several of the school attendance areas in question had low-income percentages in excess of 25 percent, these areas could qualify for Title I funds in any given year under the newer legislation, only if the total amount of funds expended under Title I and similar State programs equaled or exceeded the total amount expended from the combined sources in the preceding year. 20 U.S.C. §2732(a)(1) (Supp. V. 1981). Since the record before us does not allow for such a calculation, the Secretary of Education will be required to make this determination for each school attendance area that had a Title I project in the relevant years. *State of New Jersey, Dept. of Education* v. *Hufstedler, supra,* 724 F.2d at 37.

The matter was therefore remanded to the Secretary for further proceedings.[8]

A Petition for Rehearing was denied by the Third Circuit in an Order entered on February 7, 1984. The Secretary, on June 15, 1984, filed the instant Petition for a Writ of Certiorari.

(Footnote continued from preceding page)

Should it be determined that the Newark Title I program met the conditions necessary to apply the 25% standard, the above Title I expenditures totalling *$781,787,* would be allowed. However, disallowances for expenditures made in attendance areas with an incidence of poverty below 25% would be sustained. These disallowances total *$247,843.*

[8] Following the decision of the Third Circuit, the State Department of Education and the Newark Board of Education have engaged in a joint effort to assure that information and material necessary to demonstrate compliance with 20 U.S.C. §2732(a)(1) is provided the Secretary upon remand. The Secretary, however, has not acted to reopen the administrative proceeding before him.

ARGUMENT

The Court should not grant a writ of *certiorari* because the decision of the Third Circuit to apply the corrective eligibility standard, enacted by Congress as part of the 1978 Amendments to the ESEA, to the Newark Title I program was entirely consistent with sound judicial precedent and neither creates a conflict among the circuits on this narrow issue nor presents any novel or unique circumstances warranting review.

Throughout this protracted litigation, New Jersey has maintained that the provision of Title I programs to disadvantaged children living in school attendance areas in Newark where the percentage of children from low-income families was in excess of 25% and 30% comported with the eligibility standard contained in the Elementary and Secondary Education Act. That broad standard simply provided that Title I funds should be used for projects designed to meet the special educational needs of educationally deprived children in "school attendance areas *having high concentrations* of children from low-income families." (Emphasis added) 20 U.S.C. §241e(a) (1). The statutory language strongly supports the State's position that an objective, rather than a comparative, standard of eligibility was intended by Congress.

The Secretary, however, has argued that the widespread poverty in Newark required it to use "Title I funds in eligible low-income attendance areas with the *greatest concentrations* of educationally disadvantaged children" (PNJa27). To support this position, the Secretary points not to the language of the statute, but to that of a Title I regulation which, *inter alia*, defined an eligible school attendance area as one having a percentage of children from low-income families *equal to, or greater than,* that of the district-wide percentage. 45 C.F.R. §116.17(d) (1972). Application of this regulation led to the anomalous situation wherein eligible poor children were denied the benefits of compensatory education programs solely because they lived in school districts with exceptionally high levels of poverty. According to this regulation, a disadvantaged child living in Newark in a school attendance area with a 33.5% incidence of poverty would be deprived of Title I benefits because Newark's district-wide low-income percentage was 33.9%. However, a similar child, residing in a relatively affluent school district with a low-income percentage of 10%, would be provided a supplemental education program.

To reform this glaring defect in the Title I program, Congress enacted, as part of the 1978 Amendments to the ESEA, a 25% eligibility standard. 20 U.S.C. §2732 (a)(1). Pursuant to this standard, attendance areas with an incidence of poverty in excess of 25% could qualify for Title I funds without reference to the district-wide level of poverty. The Third Circuit, therefore, confronted the issue of whether the eligibility of the Newark attendance areas should be measured by the Title I regulation or by the corrective eligibility standard included in the 1978 Amendments to the ESEA. The court concluded that the Title I regulation frustrated the objectives of the Title I program and that the 25% eligibility standard contained in the 1978 Amendments was intended by Congress to reform that discordant agency rule. Rather than apply the disapproved rule and continue the inequities Congress sought to eliminate, the Third Circuit determined to measure the eligibility of the attendance areas in the Newark Title I program by the 25% standard contained in the 1978 Amendments

to the ESEA. In so holding, the Third Circuit acted in accord with sound judicial precedent.

It is a basic tenet of American jurisprudence that a court is to apply the law in effect at the time of decision unless manifest injustice would result from doing so or there is statutory direction or legislative history to the contrary. *Bradley* v. *School Board of the City of Richmond,* 416 U.S. 696, 711, 94 S.Ct. 2006, 2016, 40 L.Ed.2d 476 (1974). Although *Bradley* provides the clearest statement of this rule, it has its origin in *United States* v. *Schooner Peggy,* 1 Cranch, 103, 2 L.Ed. 49 (1801), which succinctly explains:

> It is in the general true that the province of an appellate court is only to inquire whether a judgment when rendered was erroneous or not. But if, subsequent to the judgment, and before the decision of the appellate court, a law intervenes and positively changes the rule which governs, the law must be obeyed, or its obligation denied. If the law be constitutional . . . I know of no court which can contest its obligation. It is true that in mere private cases between individuals, a court will and ought to struggle hard against a construction which will, by a retrospective operation, affect the rights of parties, but in great national concerns . . . the court must decide according to existing laws, and if it be necessary to set aside a judgment, rightful when rendered, but which cannot be affirmed but in violation of law, the judgment must be set aside. *Schooner Peggy, supra,* 1 Cranch at 110, 2 L.Ed. at 51 (footnote omitted).

Courts have routinely adhered to the principle articulated in *Schooner Peggy,* applying the law as they have found it at the time of decision even though the law may have

changed by virtue of constitutional amendment, *United States* v. *Chambers,* 291 U.S. 217, 54 S.Ct. 434, 78 L.Ed. 763 (1934) (Twenty-first Amendment passed, prosecution dismissed); intervening statute, *Ziffrin, Inc.* v. *United States,* 318 U.S. 73, 63 S.Ct. 465, 87 L.Ed. 621 (1943) (Principle applied to intervening change in *state* law), *Carpenter* v. *Wabash Ry. Co.,* 309 U.S. 23, 60 S.Ct. 416, 84 L.Ed. 558 (1940) (Principle applied to intervening change in *federal* law) or judicial decision, *Vandenbark* v. *Owens-Illinois Glass Co.,* 311 U.S. 538, 61 S.Ct. 347, 85 L.Ed. 327 (1941); *Hamling* v. *United States,* 418 U.S. 87, 102, 94 S.Ct. 2887, 2899-2900, 41 L.Ed.2d 590 (1974), reh. den. 419 U.S. 885 (1974).

This principle has been applied to give retroactive application to both procedural and substantive changes in the law. Illustrative of the latter is the decision of the Court in *Carpenter* v. *Wabash Ry. Co., supra,* where a plaintiff had moved to dissolve an equity receivership of a railroad because of, *inter alia,* an alleged error in the appointed master's ruling that his personal injury judgment was an unsecured claim against the railroad. While a petition for writ of *certiorari* was pending, Congress passed an amendment to the bankruptcy act wherein pending equity receiverships were to recognize claims based on personal injury judgments as preferred and were to pay such claims out of the railroad's assets as operating expenses. The Court, relying on its decision in *Schooner Peggy,* applied the law at the time of decision. In *Thompson* v. *Sawyer,* 678 F.2d 257 (D.C. Cir. 1982), female bindery workers at the Government Printing Office brought a sex discrimination suit. Relief was sought under the Equal Pay Act of 1963, an amendment to the Fair Labor Standards Act, 29 U.S.C. §206(d) (1976), and under Title VII of the Civil Rights Act of 1964, 42 U.S.C. §2000e-2 (1976). While the mat-

ter was pending in the district court, the definition of employer under the Fair Labor Standards Act was amended to include public employers. Citing the *Bradley* analysis, the Court of Appeals for the District of Columbia Circuit upheld the district court's decision that the defendants were retroactively liable for damages under the Fair Labor Standards Act Amendments of 1974. *Id.* at 279-281. *See also Gulf Offshore Co.* v. *Mobil Oil Corp.*, 453 U.S. 473, 486, n. 16, 101 S.Ct. 2870, 2879, 69 L.Ed. 2d 784 (1981) (Law affecting damages applied retroactively in private suit even though no issues of great national concern involved); *Payne* v. *Panama Canal Co.*, 607 F.2d 155 (5th Cir. 1979) (*Thorpe* [*see infra*] and *Bradley* held to require retroactive application of the 1975 and 1978 Amendments to the Back Pay Act to pending action in the computation of damages.)

The decision in *Schooner Peggy* did not make clear, however, whether a change in the law while a case was pending was to be given effect only where the law, by its own terms, was to apply to pending cases, as was true in *Schooner Peggy*, or whether the change in the law must be given effect unless it was clear from the law that it was not to apply in pending cases. This question was answered definitively in *Thorpe* v. *Housing Authority of Durham*, 393 U.S. 268, 89 S.Ct. 518, 21 L.Ed.2d 474 (1969), where the Court broadly interpreted the *Schooner Peggy* decision to apply in all situations where there is a change in the law and not just when the law by its own terms demands application in a pending case. *Thorpe, supra*, 373 U.S. at 282, 89 S. Ct. at 526. The Court further stated that the presumption is to apply a change in the law in a pending case unless there is a clear indication that it was not meant to apply to pending cases. *Ibid.*

A review of the 1978 Amendments to the ESEA, including the corrective eligibility standard here under consideration, discloses no positive statutory direction against their retroactive application.[9] The legislative history of

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[9] 20 U.S.C. §2702, which the Secretary asserts establishes the prospective nature of the 1978 Amendments, clearly does not constitute a positive direction against their retroactive application; at best, it is simply a neutral statement, neither affirming nor denying the application of the corrective provisions of the 1978 Amendments to earlier grants. The Secretary's further attempt to use the general savings statute, 1 U.S.C. §109, to establish the prospectivity of the 25% eligibility standard is similarly unpersuasive. The general savings clause provides that "[t]he repeal of any statute shall not have the effect to release or extinguish any . . . liability *incurred under such statute* . . . ." Since the purported liability on the part of New Jersey did not incur under any prior statute, but rather under deficient regulatory standards which were subsequently corrected by Congressional action, 1 U.S.C. §109 is inapplicable. Congress was free to enact the general savings clause to include within its purview ". . . liability incurred under such statute or under regulations or orders promulgated therefrom." Since the provision is specifically limited to liability incurring under a statute, it should not be extended to apply to the present case. Indeed, it has been specifically held that 1 U.S.C. §109, as a provision differing from that of the common law, "must be strictly construed and limited to repealed statutes" and not to the revocation of regulations promulgated by an administrator under legislative authority. *Rodgers* v. *United States*, 158 F.2d 835 (6th Cir. 1947), rev'd on other grounds, 332 U.S. 371, 68 S.Ct. 5, 92 L.Ed. 3 (1947). Although in the present situation, unlike *Rodgers*, Congress did amend the ESEA, these amendments, particularly the 25% eligibility standard, did not reflect a change in the mind of Congress regarding the direction of the Title I program as set forth in the prior statutory provision. Rather, the legislative objective was to correct regulations promulgated pursuant to the ESEA which actually thwarted the objectives of the Title I program. Thus, the ultimate effect of the subsequent Congressional action was not to repeal a statutory provision but to

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the Amendments, however, does contain positive evidence that their purpose was to refocus the Title I program so that it would achieve its basic objective of providing educational programs to meet the special needs of children from low-income families living within areas of high concentrations of poverty. Indeed, the extensive hearings conducted by the Subcommittee on Elementary, Secondary and Vocational Education prior to the enactment of the 1978 Amendments are particularly illuminating with regard to the eligibility issue before this Court. During the hearings, the House Subcommittee heard many complaints which centered upon the inequity of the Title I requirements which resulted in schools in needy urban areas being regarded as ineligible. *Elementary and Secondary Education: Hearings on H.R. 15 Before the Subcomm. on Elementary, Secondary, and Vocational Education of the House Comm. on Education and Labor, Part 18: Administration of Title I of ESEA* at 102; *Part 21: The Administration's Proposal for Elementary and Secondary Education* at 635, 95th Cong., 1st Sess. (1977). This anomaly in the Title I system resulted, in major part, from "federal regulations which compel the exclusion of large numbers of disadvantaged children as well as large numbers of schools with high concentrations of disadvantaged children." *Education Amendments of 1977: Hearings on S.1753 Before the Subcomm. on Education, Arts and the Humanities of the*

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disapprove an administrative regulation. Indeed, the legislative history reveals continued support for the originally stated purpose of Title I to direct payments under the program to "educationally deprived children in school attendance areas having high concentrations of children from low-income families. . . ." 20 U.S.C. §241e(a)(1). Since the impact of the 25% eligibility standard enacted as part of the 1978 Amendments is on regulations, the general savings clause, codified in 1 U.S.C. §109, does not apply.

Senate Comm. on Human Resources, Part 1, 95th Cong., 1st Sess. 92 (1978). The anomaly created by the federal regulations was aptly summarized by a witness before the Senate Subcommittee:

> Essentially a poor child in a relatively affluent district has a better chance of being in a target school and of getting services under Title I than does a similar child in a district with a high percentage of disadvantaged students. *Id.* at 93. *See also Elementary and Secondary Hearings on H.R. 15, supra, Part 12: National Organizations* at 258-259.

This dissatisfaction with the federal administration of the Title I eligibility standards was echoed by Mrs. Ruth Mancuso, testifying on behalf of the National Association of State Boards of Education:

> We have surveyed several states on a pilot basis and use Maryland as an example since information is fairly easy to obtain with its relatively few county districts (Exhibit C). In Baltimore City any school which has less than 30.3% Title I children was not eligible to receive Title I funds. This minimum is higher than the maximum incidence in schools receiving Title I funds in 11 other counties. This means there are schools in relatively affluent counties receiving Title I assistance with no more than 5% Title I children while schools in Baltimore City with 25-30% Title I children are excluded from the program. *Id.* at 392.

Distress over the inequitable situation where poor children attending schools in primarily decaying urban centers and isolated rural areas were denied the educational benefits of Title I programs was reflected in the House Report:

. . . current OE regulations [45 C.F.R. §116a20(b)(2)][10] provide that any school attendance area with 30 percent or more children from low-income families (based on eligibility for free lunch) may be designated a target area . . . . *The Committee bill reduces this minimum to 20 percent out of a concern that inflexible targeting requirements could force some school districts with very high incidences of poverty to declare schools with 20 percent low-income enrollment ineligible, while schools with only 10 percent low-income enrollment or less might be eligible in wealthier neighboring districts.* H.R. Rep. No. 1137, 95th Cong., 2d Sess. 22, *reprinted in 1978 U.S. Code Cong. & Ad. News* 4992.[11] (Emphasis added).

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[10] At the time of the legislative hearings, §116a.20(b)(2) of the Title I regulations permitted a local school district (LEA), subject to State approval (SEA), to designate as Title I project areas those attendance areas in which at least *30%* of the children were from low-income families. 45 C.F.R. §116.20(b)(2); 41 F.R. 42914 (September 28, 1976). Although this 30% rule was in effect at the time of the administrative proceeding below, it was not applied to the Newark program because it was not in effect during the audit period. Had the 30% rule been applied to Newark, seven of the thirteen attendance areas declared ineligible by the auditors would have qualified for Title I funding. The Title I moneys expended in these seven 30% areas totaled $563,221. Therefore, by application of the 30% rule, the Newark disallowance of $1,029,630 would have been reduced to a disallowance of $468,-083.

[11] See the Joint Explanatory Statement of the Committee of Conference indicating that by Senate amendment, the minimum percentage was raised to 25%; it is that minimum which was enacted as part of the 1978 Amendments to the ESEA. H.R. Conf. Rep. No. 1753, 95th Cong., 2d Sess. 255, *reprinted in* 1978 *U.S. Code Cong. & Ad. News* 5158.

The 25% eligibility standard was enacted by Congress to eliminate the inequities caused by administrative action which frustrated rather than furthered the original objectives of the Title I program. The enactment of this eligibility standard reformed administration of the Title I program so that the children it was meant to serve—educationally deprived children living in areas with high concentrations of poverty—would not be denied the benefits of much needed educational programs. Not only is there an absence of legislative direction in the 1978 Amendments against retroactive application of the corrective 25% eligibility standard, but the legislative history surrounding its enactment clearly supports its use to measure the eligibility of the Newark attendance areas for receipt of Title I moneys. Not to do so would be to judge the eligibility of these attendance areas by a regulation which, following the Newark audit, was modified by the agency itself and which, most significantly, was specifically invalidated by the 25% eligiblity standard of the 1978 Amendments.[12]

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[12] Having determined to retroactively apply 20 U.S.C. §2732(a)(1), the Third Circuit did not confront the legality of 45 C.F.R. §116.17(d) (1972), the Title I regulation which the federal auditors utilized to disqualify the Newark attendance areas. The court below did find, however, that this regulation frustrated the basic objectives of the Title I program. *State of N.J., Dept. of Education* v. *Hufstedler, supra*, 724 F.2d at 36-37. It is well established that in order for a regulation to be regarded as valid, it must be consistent with the statute under which it is promulgated. *United States* v. *Larionoff*, 431 U.S. 864, 873, 97 S.Ct. 2150, 53 L.Ed.2d 48 (1977). The power of an administrative officer or agency "to administer a federal statute and to prescribe rules and regulations to that end is . . . [only] the power to adopt regulations to carry into effect the will of Congress as expressed by the statute." *Manhattan General Equip. Co.* v. *Comm'r*, 297 U.S. 129,

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Finally, the retroactive application of the 25% eligibility standard to the Newark Title I program will visit no harm, much less "manifest injustice," on the federal government. In *Bradley*, the Court identified three concerns pertinent to the "manifest injustice" exception to the general rule requiring application of the law in effect at the time of decision. These factors are "(a) the nature and identity of the parties, (b) the nature of their rights, and (c) the nature of the impact of the change in law upon those rights." *Bradley, supra*, 416 U.S. at 717, 94 S.Ct. at 2019.

With regard to the first factor, this Court distinguished suits involving "great national concerns," and parties who are public entities, from private suits involving individuals. *Bradley, supra*, 416 U.S. at 718-719, 94 S.Ct. at 2019-2020, citing *United States* v. *Schooner Peggy*, 1 Cranch 103, 110 2 L.Ed. 49 (1801). Where private parties are concerned, the Court warned lower courts to "struggle hard against a construction which will, by a retroactive operation, affect the rights of parties." *Bradley, supra*, 416 U.S. at 717, 94 S.Ct. at 2019, citing *Schooner Peggy, supra*, 1 Cranch at 110. The instant matter, however, clearly involves important federal legislation of great

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134, 56 S.Ct. 397, 80 L.Ed.2d 528 (1936). A regulation which fails to carry out the legislative intent, but rather operates "to create a rule out of harmony with the statute, is a mere nullity." *Ibid.*; *Ernst & Ernst* v. *Hochfelder*, 425 U.S. 185, 213-14, 96 S.Ct. 1375, 47 L.Ed.2d 668 (1976); *Dixon* v. *United States*, 381 U.S. 68, 74, 85 S.Ct. 1301, 14 L.Ed.2d 223 (1965). Insofar as the controverted regulation was not reasonably related to the Congressional purpose, but rather defeated that purpose by denying eligible children compensatory education programs simply because they lived in school districts with exceptionally high levels of poverty, the court below could have reasonably found the rule a nullity and reversed the resultant disqualifications.

national concern, namely the largest federal program of assistance to education which is intended to focus upon the most educationally deprived children in the country. Retroactive application of the corrective 25% eligibility standard enacted as part of the 1978 Amendments to the ESEA is also encouraged by the fact that the parties to this suit are public entities. Indeed, courts have refused to find prejudice or manifest injustice in the application of new legislation to pending matters when the only interests impaired by the congressional action are those of the government itself. *See Hill* v. *United States*, 571 F.2d 1098, 1102 (9th Cir. 1978).

With regard to the "nature of the rights" of the parties and the "nature of the impact of the change in law upon those rights," there is clearly no vested right, in the matter *sub judice*, in the continued application of an administrative regulation which impedes the basic objectives of the Title I program. On the contrary, the only true right involved herein is the public "right" or expectation that Title I moneys will be expended to provide necessary compensatory education programs structured to meet the special needs of poor children living in areas with high concentrations of poverty. To the extent that the retroactive application of the 25% eligibility standard contained in the 1978 Amendments conforms implementation of that program to its original objective, it augments rather than impairs, that public right. The retroactive application of this eligibility standard to the Newark Title I program, therefore, presents no factors which would trigger the "manifest injustice" exception to retroactivity.

The decision of the Third Circuit to apply the 25% eligiblity standard to the Newark Title I program is, therefore, in accord with sound judicial precedent since this standard is the law in effect at the time of decision and

since there is no statutory direction against such application nor "manifest injustice" resulting therefrom.

The Secretary also contends that this Court should grant *certiorari* since the decision below "cannot be reconciled with the approach of other courts of appeal." (Pb7). A reading of the purportedly "irreconcilable" decisions cited by the Secretary demonstrates that the other courts simply did not consider the issue before the Third Circuit. These courts did not have to determine whether eligibility for receipt of Title I moneys, or for any other federal grant, should be measured by a legislative amendment which corrected an administrative rule which thwarted the original Congressional objective in enacting that program or whether eligibility should be judged by the legislatively discredited agency rule. Since the other circuits neither considered nor resolved this issue, there can be no conflict nor division between the Third Circuit and the other courts of appeal. It is only such direct conflict or division among and between the circuits "on the same matter" which, pursuant to Rule 17(1)(a), will be considered by this Court when determining whether to exercise its discretion and grant a petition for writ of *certiorari*.

Indeed, the decision below is singularly lacking in those factors which might justify review by this Court. As fully discussed *ante*, this decision is in accord with sound judicial precedent and announces no novel principle of law. Furthermore, it simply does not have the broad ramifications suggested by the Secretary. While there may be $68 million in Title I audit claims outstanding, the Secretary does not disclose what percentage involve pre-1978 Title I programs and how many claims, if any, implicate the 25% eligibility standard. It would only be such a claim, if one exists, involving a recipient in the Third Circuit which would be directly impacted by the decision below. Similarly, while a survey of major federal granting agencies may show $830 million in grant exceptions, there is no indication of the percentage within the Third Circuit nor, more importantly, any indication as to how many within the Third Circuit involve the unique situation confronted by the court below. It was only when faced with a grant program conducted by a recipient in a manner which furthered the original Congressional objective, but was disqualified by virtue of an administrative regulation which was later rejected by Congress as inharmonious with its original intent, that the Third Circuit applied a subsequently enacted eligibility standard to an earlier grant program. The Third Circuit would, undoubtedly, put any challenge advanced by a federal grant recipient, based upon the decision below, to a similar rigorous analysis. The decision below is therefore not only quite narrow as to its holding but also extremely limited in its potential impact.

Furthermore, the court below did not absolve New Jersey and the Newark school district of their responsibilities under Title I legislation. Rather, having concluded that the 25% eligibility standard should be applied to the Newark Title I program, it remanded the matter to the Secretary for further proceedings to determine whether Newark qualified, under the statute, for application of this standard. Upon remand, New Jersey will have the burden of demonstrating compliance thereby assuring that the basic objectives of the Title I program have been met; it is a burden which New Jersey is ready and willing to shoulder. Furthermore, the application of the 25% eligibility standard does not implicate the whole of the Newark disallowances. Of the 13 school attendance areas found ineligible for Title I funds by the federal auditors, three had an incidence of poverty below 25%. Under the Court's ruling, the disallowances in these attendance areas, totalling $247,843, would be sustained. The

decision below, therefore, does not undermine the important federal audit process; it merely serves to assure that the auditing process does not result in disallowances of expenditures which furthered the basic objectives of the grant program and were made in accordance with appropriate eligibility standards.

Finally, in reaching its determination, the court below focused unerringly upon the Congressional objectives in enacting the Title I program—that poor, educationally disadvantaged children living in areas with high concentrations of poverty would be provided programs of compensatory education tailored to meet their special educational needs. The Third Circuit concluded that the poor, disadvantaged children of Newark living in attendance areas where the levels of poverty were in excess of 25% and 30% were precisely the children who were the intended beneficiaries of the Title I program. As a decision which faithfully and correctly advances the basic educational objectives of the Title I program, it need not be reviewed by this Court.[13]

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[13] The federal commitment to better the educational lot of poor, disadvantaged children, as evidenced by the Title I program, is clearly matched by New Jersey's commitment in this area. While Title I moneys available to educationally disadvantaged children in Newark have remained fairly constant, *i.e.* $9,631,019 in 1970-71; $9,899,446 in 1971-72; $9,379,648 in 1972-73 and $10,795,535 in 1982-83; State aid to Newark has increased dramatically, *i.e.* $21,566,996 in 1970-71; $29,069,240 in 1971-72; $38,517,410 in 1972-73 and $132,769,653 in 1982-83. *Twentieth Annual Report of the Commissioner of Education,* State of New Jersey; *Twenty-First Annual Report of the Commissioner of Education,* State of New Jersey; *Twenty-Second Annual Report of the Commissioner of Education,* State of New Jersey; *Thirty-Second Annual Report of the Commissioner of Education, State of New Jersey.*

CONCLUSION

For these reasons, the Petition for Writ of *Certiorari* should be denied.

Respectfully submitted,

IRWIN I. KIMMELMAN
Attorney General of New Jersey,
Attorney for Respondent, State of New Jersey, Department of Education
Richard J. Hughes Justice Complex
CN 112
Trenton, New Jersey 08625.
(609) 292-8577

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